NO. 85989-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STERLING SAVINGS BANK, CLARK COUNTY, & THE CITY OF LA CENTER, *ET AL.*

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, AN AGENCY OF THE STATE OF WASHINGTON, *ET AL.*,

Respondents.

ANSWER TO PETITIONS FOR REVIEW BY KARPINSKI, CCNRC, AND FUTUREWISE RESPONDENTS

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Karpinski Respondents

TABLE OF CONTENTS

TABLE OF CASES

Cases

Statutes

Other Authorities

I. IDENTITY OF ANSWERING PARTIES

Respondents, John Karpinski, Clark County Natural Resources Council, and Futurewise, *et al.* ("Karpinski") filed a Petition for Review with the Western Washington Growth Management Hearings Board and have actively participated in all aspects of this litigation since that time.

II. CITATION TO DECISION BELOW

Clark County Washington v. Western Washington Growth Mgmt. Hearings Bd., 39546-1-II, --- P.3d ----, 2011 WL 1402769 (Wn.App. Div. 2). The decision of the Central Puget Sound Growth Management Hearings Board reviewed by the Court of Appeals was *Karpinski v. Clark County*, WWGMHB No. 07-2-0027 (June 3, 2008).

III. STATEMENT OF THE CASE

Two years after its 2004 Growth Management Act (GMA) comprehensive plan update, Clark County adopted Ordinance 2007-09-13 which de-designated 19 areas previously designated agricultural lands of long-term commercial significance. The de-designated areas consisted of 4,351 acres which were added to Clark County's Urban Growth Areas (UGAs). Appellants John Karpinski, Clark County Natural Resources Council, and Futurewise, filed a Petition for Review with the Western

Washington Growth Management Hearings Board ("GMHB" or "Board") challenging the County's environmental review and public participation processes, the de-designation of agricultural land, and the addition of that same land to the County's UGAs.

The Board also found the de-designation of some of the agricultural areas non-compliant with law. The non-compliant areas have been consistently identified by area and an abbreviation by the County, Board, Superior Court, Court of Appeals, and Parties; to wit, Battleground – BC, Camas – CA-1, Camas – CB, La Center – LB-1, La Center – LB-2, La Center – LE, Ridgefield – RB-2, Vancouver – VA, Vancouver – VA-2, Vancouver – VB, and Washougal – WB.

Clark County Washington, City of La Center, GM Camas LLC, MacDonald Living Trust, and Renaissance Homes appealed the decision of the Board to the Superior Court. On review, the Superior Court found that the Board had erred in finding the County out of compliance with respect to the de-designation of areas WB, CB, LB-1, LB-2, LE, VA, and VA-2. The Superior Court affirmed the Board with respect to the remaining de-designated areas, BC, VB, and portions of RB-2.

Alleging that there was no evidence before the Superior Court that the Board's Order had not been "supported by evidence that is substantial

when viewed in light of the whole record before the court,"[1] Karpinski sought review by the Court of Appeals.

Under the GMA, a county may designate unincorporated territory as part of an Urban Growth Area, provided it meets certain criteria. From the start, the gravamen of this case was the question of whether the land areas in question were properly de-designated and then transferred to UGAs. In a surprising twist, during the pendency of the appeal to the Superior Court and Court of Appeals, some of the parcels involved in the litigation were annexed by their respective, adjacent cities. The cities were parties to the then-pending action, incidentally.

This created an interesting quandary for Karpinski because a city's UGA is, as a matter of law, required to include all the land within the jurisdiction's territorial boundaries,[2] and so by annexing the areas which Karpinski was challenging should not have been designated as part of a UGA, the respective parties and cities had—it appeared at the time—successfully cut off review. It appeared to Karpinski that the cities had managed a clever legal *fait accompli* rendering the issues related to the annexed areas moot.

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[1] RCW 34.05.570(3)(e).
[2] RCW 36.70A.110(1).

Based upon the parties' interpretation of the law, the annexation by the City of Camas of the area referred to throughout these proceedings as Area CA-1 resulted in Karpinski stipulating to reversal of the decision of the Hearings Board (which had found the UGA designation improper) because as part of the City of Camas it now had to be part of Camas' UGA pursuant to RCW 36.70A.110(1). The stipulation was entered by the Clark County Superior Court.[3] Having so stipulated, Karpinski perceived that stipulation to have become the law of the case. Thus Karpinski did not perceive this area to be encompassed in their petition of appeal.

The areas referred to throughout these proceedings as RB-2 and CB were mostly or fully annexed by the City of Ridgefield and the City of Camas, respectively, during the pendency of this case, but unlike Area CA-1, neither was the subject of a stipulation during the appellate proceedings before the Superior Court.

With areas CB and RB-2 Karpinski was again forced to conclude that those portions of the areas which were annexed by the City of Camas and City of Ridgefield during the pendency of this case now fell within the

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[3] *See* CP 48, Stipulation and Agreed Order entered February 26, 2009.

annexing jurisdiction's UGA as a matter of law, and therefore Karpinski stipulated to a finding of compliance as to these areas before the Hearings Board.

On review, the Court of Appeals ruled that the parties' interpretation of law related to the annexations was incorrect. The Court of Appeals found that:;

> challenged County legislative actions pending review are not final and no party may act in reliance on them. In this case, the city of [*sic*] ordinances purporting to annex land in parcels CA–1, CB, and RB–2 did not deprive the Growth Board of jurisdiction over the challenge to the County's actions. Accordingly, here the Growth Board did not err by entering findings and conclusions related to parcels CA–1, CB, and RB–2 in its final order after Camas and Ridgefield purported to annex parts of these parcels.

Clark County v. WWGMHB, --- P.3d ----, 2011 WL 1402769 at ¶ 24.

Sterling Savings Bank (Sterling), successor in interest to original party GM Camas, LLC, Clark County, and the City of La Center now seek review of the Court of Appeals decision.

IV. ARGUMENT CONTRA REVIEW

A. THERE IS NO SIGNIFICANT QUESTION OF LAW OR ISSUE OF SUBSTANTIAL PUBLIC INTEREST WARRANTING REVIEW BY THE COURT.

RAP 13.4(b) provides that the Court will accept a petition for review if the petition raises a significant question of law under either the

Washington or Federal Constitutions or "involves an issue of substantial interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

A number of the issues decided by the Court of Appeals below are certainly of public interest and importance inasmuch as the decision addresses whether a local government can, through annexation, insulate its land use decision under the GMA from administrative and judicial review. Because the Court of Appeals addressed this question in accordance with well established precedent, there remains no pressing question of substantial public interest to be addressed by the Court.

Further, the Washington Supreme Court has addressed the designation and de-designation of agricultural lands and including such lands in urban growth areas before. *See Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096 (2006); *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2008). The court of appeals carefully followed the Supreme Court precedent on designating and de-designating agricultural lands and the Supreme Court does not need to review the court of appeal's accurate application of those decisions.

B. THE COURT OF APPEALS DID NOT LACK JURISDICTION.

Sterling's main argument in support of review is that because no party challenged the annexation and resultant inclusion of the annexed areas within UGAs, the Court of Appeals was without jurisdiction to consider those issues. This argument misconstrues subject matter jurisdiction and ultimately fails.

"Jurisdiction is the power of the court to hear and determine the class of action to which a case belongs." *State v. Buchanan*, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999), *cert. denied*, 528 U.S. 1154 (1999). In this case, there is no question that the Court of Appeals has subject matter jurisdiction to hear appeals from GMA decisions issued by a Superior Court. Sterling's error is evident, for example, in its discussion of a timely notice of appeal being jurisdictional in nature.[4] There is no question in this case that a timely notice of appeal was filed. That satisfies the jurisdictional question. Rather, Sterling's argument seems to be that the issues addressed by the Court of Appeals were not properly before the court, which has little to do with jurisdiction. And indeed, a

> judgment may properly be rendered against a party only if the court has authority to adjudicate the *type of controversy*

[4] Petition for Review at 7.

> involved in the action. We underscore the phrase 'type of controversy' to emphasize its importance. A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.

Marley v. Department of Labor and Industries of State, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (internal quotes and references omitted, italic emphasis *sic.*, underline emphasis supplied).

To the extent that Sterling argues the Court of Appeals lacked jurisdiction, its argument utterly fails. A closer question is whether, to borrow the *Marley* Court's phrase, the Court of appeals lacked authority to enter the Order it did below. Because the Court of Appeals sits in the same position as the Superior Court and reviews the Board's decision and order, not the Superior Court's, and because the a Court is not bound by the erroneous interpretation of law stipulated to by parties, the Court of Appeals decision was in accord with law.

C. NO COURT—INCLUDING THE COURT OF APPEALS IN THIS CASE—IS BOUND BY THE ERRONEOUS INTERPRETATION OF LAW STIPULATED TO BY THE PARTIES.

In the present case, the stipulation below upon which Sterling bases its argument that Court of Appeals was without authority to enter its order below rests upon on the proposition that the parties herein have stipulated themselves out of court. As this Court has observed,

> [s]uch a result, however, is not possible. Courts of law are not bound by parties' stipulations of law. *See 50* Am.Jur. *Stipulations* § 5, at 607; 5 Am.Jur.2d *Appeal and Error* § 712, at 158. The propriety of disregarding stipulations as to questions of law is considered to be particularly clear where such stipulations are made in cases concerning a public issue.

Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988), *citing North Platte Lodge v. Board of Equalization,* 125 Neb. 841, 252 N.W. 313, 92 A.L.R. 658 (1934).

Both the GMA and annexation are public issues. And the Court of Appeals was very clear about how the parties had erred. The Court wrote:

> Under the parties' interpretation of RCW 36.70A.300(4), .320(1), and former RCW 36.70A.302(2), the GMA would be unenforceable. The parties' interpretation would allow a county to incorporate any land into a UGA regardless of whether it satisfies the GMA's requirements; draw out the appeal at the Growth Board level until a city could pass an ordinance annexing the property; and then moot out any challenges by citing the county's lack of authority over the lands or argue, as it did here, that the annexation deprived the Growth Board of jurisdiction to review its decision to include the property in the UGA. The legislature did not intend to permit counties to evade review of their GMA planning decisions in his manner, and the GMA's statutory scheme does not allow them to do so.

Clark County v. WWGMHB, --- P.3d ----, 2011 WL 1402769 at ¶ 29.

Were it the case that the Court of Appeals in this GMA case was called upon to review the Superior Court's decision, Sterling might well be right that the Court of Appeals erred in its decision below by reaching

questions which were moot, not properly preserved, not assigned as error, and so on. But the Court of Appeals in a GMA case like this does not review the Superior Court and, moreover, owes that court no deference.

On appeal, the Court of Appeals applies the standards of the Administrative Procedure Act (APA), chapter 34.05 RCW, "'directly to the record before the agency, sitting in the same position as the superior court.'" *Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wn..2d 488, 497, 139 P.3d 1096 (2006), *quoting King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Id.* at 498, 139 P.3d 1096.

Because the Court of Appeals consideration of this case was not limited to the issues raised and addressed by the Superior Court and because the Court of Appeals was not only entitled but obliged to correct the parties' erroneous interpretations of law, Sterling's argument in support of review fails.

V. CONCLUSION

For the foregoing reasons, and each of them, Sterling's Petition for Review should be denied.

Respectfully submitted this 13th day of June 2011,

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Counsel for Karpinski, CCNRC, and Futurewise

CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of June 2011 he caused a true and correct copy of the foregoing **Answer** to be served upon the following persons via U.S. Mail, postage prepaid.

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